U.S. Department of Labor

Office of Administrative Law Judges
36 E. 7th St., Suite 2525
Cincinnati, Ohio 45202

(513) 684-3252
(513) 684-6108 (FAX)

Issue Date: 03 April 2006

Case No: 2001-BLA-0315

In the Matter of

WILLIAM E. DALTON

Claimant

v.

FRONTIER-KEMPER CONSTRUCTORS, INCORPORATED

Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS

Party-in-Interest

APPEARANCES:

Anne Megan Davis, Esq.
Johnson, Jones, Snelling, Gilbert & Davis
Chicago, Illinois
For the Claimant

Mary Lou Smith, Esq.
Howe, Anderson & Steyer
Washington, D.C. 20006
For the Employer

Richard J. Fiore, Esq.
U.S Department of Labor
Office of the Solicitor
Chicago, Illinois
For the Director

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

DECISION AND ORDER ON REMAND — AWARDING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the Act). The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title.

Benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Surviving dependents of coal miners whose deaths were caused by pneumoconiosis may also recover benefits. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201 (1996).

On October 14, 2003, I issued a Decision and Order Awarding Benefits to the Claimant, William E. Dalton. In that Decision, I found that Claimant was a "miner" under the regulations, that he had worked 22 years and 3 months in qualifying coal mine employment and that the named Employer, Frontier-Kemper Constructors, Inc., is the proper Responsible Operator. I then found that Mr. Dalton suffered from pneumoconiosis pursuant to § 718.202(a)(1) and by medical opinion evidence pursuant to § 718.203(a)(4); that his pneumoconiosis arose out of his coal mine employment pursuant to the presumption provided in § 718.203(b); and that Claimant's total disability was due to his pneumoconiosis as set forth in § 718.204(c). On appeal, the Benefits Review Board affirmed this decision in part, and vacated in part, and remanded to the Office of Administrative Law Judges in a Decision and Order issued November 26, 2004.

The Findings of Fact and Conclusions of Law that are contained in my prior Decision and Order are adopted in this decision except to the extent that they were found to be erroneous by the Board or to the extent that they are inconsistent with the findings and conclusions expressed herein. The Claimant and the Employer filed briefs on remand, which have been received into the record and considered.

Remand Order of the Benefits Review Board

In its Decision and Order, the Board reviewed, at length, the Employer's challenge to my finding that Claimant was a "miner" under the regulations, but rejected the Employer's argument that Claimant's position as a construction contractor did not qualify. Secondly, the Board affirmed my findings that Claimant had worked for at least 10 years in qualifying coal mine employment and that the Employer was the proper Responsible Operator for this claim. The Board did not disturb my finding that Claimant had shown total disability pursuant to § 718.204(b)(2) on the ground that the Employer had not contested this issue. However, the Board found that I had "mischaracterized" the most recent x-ray evidence by stating that the record included three recent x-rays from 2002 when, in fact, there exist only two x-rays in the record taken that year. The Board also noted my error in stating that the four negative readings of those two 2002 x-ray films were by B-readers while omitting the fact that these B-readers were also board-certified radiologists. My decision was then vacated and remanded for reconsideration of this x-ray evidence in resolving the issue of whether Mr. Dalton suffers from pneumoconiosis under § 718.204(a)(1). The Board also found error in my failure to consider the negative CT scans of record and weighing this type of evidence along with the medical opinion evidence before concluding that this evidence established the existence of pneumoconiosis under § 718.204(a)(4). Therefore, the Board directed that, if I find no pneumoconiosis under § 718.204(a)(1), I must reconsider all medical evidence to determine if Claimant can establish the existence of pneumoconiosis under this alternative regulatory method.[1]

As a result of vacating my findings that Claimant suffered from pneumoconiosis, the Board also vacated my findings that: 1) Claimant was entitled to a presumption that his pneumoconiosis arose out of coal mine employment; and 2) Claimant's total disability was due to the disease. The Board clarified that the Employer's burden of rebutting the presumption of causation under § 718.203(b) is to show that pneumoconiosis, if proven, did not arise out of his coal mining employment.

[1] The Board rejected the Employer's argument that all types of evidence presented under § 718.204(a) must be weighed together and against each other as required in cases falling within the jurisdiction of the Fourth Circuit. *See e.g. Island Creek Coal Co. v. Compton*, 211 F.3d 293, 22 BLR 2-162 (4th Cir. 2000). As noted by the Board, this case falls within the jurisdiction of the Seventh Circuit since Mr. Dalton performed his last coal mine employment in Illinois. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

The Board approved of my medical opinion analysis, announcing that I had properly credited Dr. Cohen's opinion and Dr. Diaz's opinion as being well-reasoned and documented; and that I had properly accorded greater probative weight to these two opinions because of their superior credentials. I had also permissibly discounted Dr. Selby's opinion because of his conclusory opinion that Claimant's chronic obstructive pulmonary disease was due entirely to smoking. Next, the Board found that I had not erred in failing to draw a negative inference from Dr. Jani's reports based on that physician's omission from his progress notes that Mr. Dalton's chronic lung disease was related to coal mine employment.

The Employer filed a Motion for Reconsideration of the Board's Decision and on May 4, 2005, the Board denied this Motion. Specifically, the Board rejected the Employer's contention that the Fourth Circuit's holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 293, 22 BLR 2-162 (4th Cir. 2000), should be applied to this claim. The Board also rejected the Employer's argument that Claimant was not a "miner" under the Act and regulations. 30 U.S.C. § 902(d); 20 C.F.R. § 725.202(b).

ISSUES

Following the Board's directive, the following issues remain for resolution:

1. Whether Claimant has pneumoconiosis as shown by the x-ray evidence of record pursuant to § 718.204(a)(1);

2. If Clamant does not establish the existence of pneumoconiosis under § 718.204(a)(1), whether Claimant can establish the existence of pneumoconiosis by medical opinion and other medical evidence under § 718.204(a)(4);

3. If pneumoconiosis is established, whether Claimant's pneumoconiosis arose of his coal mine employment under § 718.203(b); and

4. Whether Claimant's disability is due to pneumoconiosis.[2]

[2] In its Brief on Remand, the employer has preserved for appeal the issues of whether Claimant is a "miner" under the regulations and whether Claimant has shown at least 10 years of qualifying coal mine employment,

DISCUSSION AND APPLICABLE LAW

As discussed in the prior Decision and Order, this claim shall be adjudicated under the regulations at 20 C.F.R. Part 718.

MEDICAL EVIDENCE OF PNEUMOCONIOSIS[3]

Reconsideration of X-ray Evidence

The x-ray interpretations were summarized in my prior Decision and Order and all parties approved a Joint Exhibit setting forth the x-rays of record to be considered. (JX 1). Thus, Joint Exhibit 1 and the table of x-ray evidence included in my prior Decision (pp. 13-14) are hereby incorporated into this Decision and Order and the x-rays and readings listed therein will be described only to the extent necessary to meet the Board's directive of reconsidering this evidence pursuant to § 718.204(a)(1).

The Board did not disturb my summary of the x-rays taken from 1980 through 1999, but recognized my error in describing the readings of the two most recent x-rays, taken on November 11, 2002 and on December 30, 2002. Specifically, the Board noted that only two, rather than three x-rays were taken in 2002 as misstated in my Decision. A review of the evidence shows that Drs. Miller, Cappiello and Ahmed all read the two x-rays taken in 2002 as positive for the existence of pneumoconiosis, while Drs. Scott and Wheeler read these same two x-ray films as negative for the disease. The record contains the qualifications for Drs. Miller, Cappiello and Ahmed, revealing that these physicians are dually-qualified as B-readers and board-certified radiologists.[4] The ILO forms completed by Drs.

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notwithstanding the Board's affirmation of my findings on these issues in Claimant's favor.

[3] Because Mr. Dalton's claim was filed prior to January 19, 2001, the effective date of the amended regulations, the limitations on evidence as set forth in current Sections 725.414, 725.456, 725.457, and 725.458 do not apply to this case.

[4] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. *See* 42 C.F.R. § 37.51(b)(2). Interpretations by a physician who is a "B" reader and is certified by the American Board of Radiology (designated on the chart as "BCR") may be given greater evidentiary weight than an interpretation by any other reader. *See Woodward v. Director, OWCP*,

Scott and Wheeler describe their interpretations as "B-readings," but do not indicate whether they are also radiologists. Further, the record does not contain curriculum vitae for these two physicians. However, I take judicial notice that these two physicians are board-certified in radiology and attach to this Decision and Order the American Board of Medical Specialties' listing of these two doctors as such. Therefore, all of the six physicians who interpreted the most recent x-rays of record are equally qualified.

The Board confirmed in its Decision and Order that I properly assigned greater probative weight to interpretations of the most recent x-rays, in that pneumoconiosis is recognized as a latent and progressive disease. Therefore, it is proper for me to assign greater probative weight to these ten interpretations of the 2002 x-ray films over the earlier x-rays films, taken from 1980 through January of 2000, considering that the span of time from January of 2000 to the most recent films taken in November of 2002 was almost three years. As recognized by the Board, six of these readings are positive for pneumoconiosis while four of them are negative. Therefore, I find the weight of these readings, all by highly-qualified readers, establish the existence of pneumoconiosis pursuant to § 718.204(a)(1).

As noted by the Board, in cases arising within the Seventh Circuit, I need not weigh the x-ray evidence along with other types of evidence set forth in under § 718.204(a) in concluding that Claimant has established the existence of pneumoconiosis, as this section sets forth "alternative" methods for the Claimant to meet this element of entitlement. The Board recognized that I need only consider the remaining evidence, such as the medical opinions and CT scans, "if, after

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991 F.2d 314, 316 n.4 (6th Cir. 1993); *Herald v. Director, OWCP*, BRB No. 94-2354 BLA (Mar. 23, 1995)(unpublished). When evaluating interpretations of miners' chest x-rays, an administrative law judge may assign greater evidentiary weight to readings of physicians with superior qualifications. 20 C.F.R. § 718.202(a)(1); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985). The Benefits Review Board and the United States Court of Appeals for the Sixth Circuit have approved attributing more weight to interpretations of "B" readers because of their expertise in x-ray classification. *See Warmus v. Pittsburgh & Midway Coal Mining Co.*, 839 F.2d 257, 261 n.4 (6th Cir. 1988); *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773, 1-776 (1984). The Board has held that it is also proper to credit the interpretation of a dually qualified physician over the interpretation of a B-reader. *Cranor v. Peabody Coal Co.*, 22 B.L.R. 1-1 (1999) (en banc on recon.); *Sheckler v. Clinchfield Coal Co.*, 7 B.L.R. 1-128 (1984). *See also Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985) (weighing evidence under Part 718).

reconsidering the x-ray evidence on remand under Section 718.202(a)(1), he determines that claimant failed to establish the existence of pneumoconiosis by that alternative method." However, I must still determine whether Mr. Dalton's pneumoconiosis arose out of his coal mine employment.

CAUSE OF CLAIMANT'S PNEUMOCONIOSIS

Because Mr. Dalton has established over ten years of coal mine employment, he is entitled to the rebuttable presumption that his pneumoconiosis arose from coal mine employment. *See* 20 C.F.R. § 718.203(b).

In its Brief on Remand, the Employer first argues that Mr. Dalton's treating physicians and, in particular, Dr. Jani, never positively diagnosed the existence of pneumoconiosis during the period he treated Mr. Dalton for his respiratory disease. The Employer reasons that, as Mr. Dalton's treating physician, Dr, Jani would have been more familiar with Claimant's condition so that his failure to make a connection between Claimant's respiratory ailment and his past coal mining employment implies that Dr. Jani did not believe Claimant's respiratory problem had been caused by this employment. However, this same rationale was rejected by the Board in discussing the evidence surrounding the existence of clinical pneumoconiosis:

> In addition, the administrative law judge did not err in failing to draw a negative inference that Dr. Jani opined that claimant does not have pneumoconiosis because Dr. Jani consistently diagnosed chronic obstructive pulmonary disease in his numerous treatment records of claimant without connecting the condition to coal dust exposure. *See Gober v. Reading Anthracite Co.*, 12 BLR 1-67, 1-69 (1988). As the administrative law judge found, Dr. Jani did not indicate in his records *any* cause for claimant's chronic obstructive pulmonary disease. . . . Consequently, the administrative law judge properly found that Dr. Jani's treatment records were not probative of whether claimant has pneumoconiosis.

In the same vein, I will not draw a negative inference from Dr. Jani's notes, which do not contain a diagnosis of pneumoconiosis, in resolving the issue of whether the miner's established pneumoconiosis arose out of his past coal mine employment. Therefore, Employer's first argument is not persuasive.

The Employer next argues that several doctors relied on an inaccurate smoking history in concluding that Claimant's respiratory condition arose out of his coal mine employment rather than from other causes. Specifically, the Employer believes that Claimant's testimony, along with Dr. Jani's progress notes, show that Claimant smoked cigarettes for a longer period than reported by the other physicians of record, making less reliable the opinions of Drs. Cohen and Diaz as to the cause of the Claimant's respiratory problem. The Employer repeats its argument presented to the Board in its Petition for Review that Claimant was never actually a "coal miner" and did not have the "level of exposure" which a 22-year history of coal mining implies. Based on these allegations, the Employer argues that the medical opinions of Drs. Diaz and Cohen are not as reasoned as the opinion of Dr. Selby because Drs. Diaz and Cohen relied on a 22-year coal mining history and 15 to 20 pack-year smoking history, whereas the Claimant's exposure to coal dust was much less and his smoking history was far greater. However, the Employer's arguments directly contradict previous findings that were not disturbed by the Board and the Employer's arguments surrounding the Claimant's smoking history and coal dust exposure were considered and rejected by the Board.

First, the Board affirmed my finding that Claimant was a "miner" under the Act and explained that "contrary to employer's contention, the fact that claimant worked on construction projects at non-operational mine sites does not, by itself, demonstrate a lack of coal mine dust exposure." The Board also approved my reliance on Claimant's credible testimony and affidavit which evidence provided a "very detailed work history, where claimant described the specific activities he engaged in at each coal mine construction project and how these activities exposed him to coal dust." In contrast, the Employer has offered only a "more general description of claimant's duties" and merely asserts, without establishing within any supportive evidence, that claimant was not exposed to coal dust, that the potential for coal dust exposure in claimant's coal mine construction work for employer was limited or minimal. Therefore, the medical opinions describing a 22-year coal mining employment history and exposure to coal dust need not be assigned less weight.

Secondly, the Board did not disturb my finding that the record showed a smoking history of ¾ pack of cigarettes a day for 20 years. The reports by Drs. Diaz and Cohen, as well as Dr. Selby, all relied on a smoking history very close to that

finding, at least within a range of 5 years. Therefore, contrary to the Employer's argument, this factor does not detract from the medical opinions relating to the cause of Mr. Dalton's pneumoconiosis.

Third, the Board specifically affirmed the manner in which I weighed the opinions of Drs. Diaz, Cohen and Selby, specifically: 1) the opinions of Drs. Diaz and Cohen were entitled to greater probative weight because they were well-reasoned and documented, and because these doctors were well-published in coal mine health and COPD; and 2) Dr. Selby's opinion was "permissibly discounted" because of his "conclusory opinion" that Claimant's chronic obstructive disease was due entirely to smoking." Therefore, on the basis of my previous analysis of the evidence, coal mining history, smoking history and the Board's affirmation of this analysis relative to the weight I assigned to the medical opinions, I find no merit in the Employer's argument that the medical opinions supporting causation of Mr. Dalton's pneumoconiosis from his coal mining employment should be given little weight. More importantly, the burden is not on the Claimant in this case to show causation at this point, but for the Employer to present evidence establishing that Claimant's pneumoconiosis did not arise out of his past coal mining employment. Notwithstanding its several arguments outlined, above, the Employer has presented no evidence to rebut the presumption provided to Claimant under § 718.203(b).

TOTAL DISABILITY DUE TO PNEUMOCONIOSIS

The Board did not disturb my finding that Claimant was totally disabled due to a respiratory impairment. However, because the Board vacated my finding surrounding the existence of pneumoconiosis, it found that I must also reconsider the evidence relevant to the one remaining issue of whether Mr. Dalton's respiratory disability is due to pneumoconiosis as defined in the regulations. 20 C.F.R. § 718.204(c)(1).

The Employer's arguments in this regard are identical to its arguments presented, above, relative to the reliability of the medical opinions considered in my previous Decision and Order. Specifically, the Employer believes that Dr. Selby's opinion is more credible than the opinions of Drs. Diaz and Cohen because the objective tests of record allegedly show that the patient's impairment is due to COPD caused by cigarette smoking or caused by other factors as discussed by Dr. Selby. However, as explained above, the Board affirmed my analysis of

the medical opinions and objective tests of record and approved my assignment of the most probative weight to the well-reasoned and documented opinions of the pulmonary specialists, Drs. Diaz and Cohen, who unequivocally stated that Claimant's COPD was caused, in part, by coal dust exposure and contributed significantly to his disease. As stated in my previous Decision and Order, Dr. Selby provided no explanation for completely ruling out coal dust exposure as a factor contributing to Mr. Dalton's impairment so that his opinion is entitled to less probative weight. Moreover, Dr. Selby's opinion is less credible on this issue, as he did not find the existence of pneumoconiosis. *See Toler v. Eastern Assoc. Coal Co.*, 43 F.3c 109 (4th Cir. 1995). Relying principally on the opinions of Drs. Diaz and Cohen, I find that Claimant has established that his total disability is due to pneumoconiosis under § 718.204(c)(1).

In conclusion and upon reconsideration of the evidence according to the Board's directive, I find that Claimant has established the elements remaining for him to be entitled to benefits, specifically: 1) the existence of pneumoconiosis, based on the x-ray evidence pursuant to § 718.204(a)(1); 2) his pneumoconiosis arose from his past coal mining employment pursuant to § 718.203(b); and 3) he is totally disabled due to pneumoconiosis pursuant to § 718.204(c). Accordingly, Claimant must be awarded benefits.

ENTITLEMENT

After considering all reliable medical evidence of record, I find that this evidence does not clearly establish the month and or year Claimant became totally disabled due to pneumoconiosis. Therefore, I find that Claimant is entitled to benefits from June 1, 1999, the month during which this claim was filed. 20 C.F.R. §725.503(b).

ATTORNEY FEE

Claimant's counsel has fifteen days from the date of receipt of this decision to submit an application for an attorney's fee. The application must be served on all parties, including Claimant, and proof of service must be filed with the application. The parties are allowed fifteen days following service of the application to file objections to the fee application. If no response is received within this fifteen day period, any objections to the requested fees will be deemed waived.

In preparing the attorney's fee application, the attention of counsel is directed to the provisions of §§ 725.365 and 725.366. According to these provisions and applicable case law, the fee application of Claimant's counsel shall include the following:

1. A complete statement of the extent and character of each separate service performed shown by date of performance;

2. An indication of the professional status (e.g., attorney, paralegal, law clerk, lay representative, or clerical) of the person performing each quantum of work and customary billing rate:

3. A statement showing the basis for the hourly rate being charged by each individual responsible for the rendering of services;

4. A statement as to the attorney or other lay representative's experience and expertise in the area of Black Lung law;

5. A listing of reasonable and unreimbursed expenses, including travel expenses; and

6. A description of any fee requested, charged, or received for services rendered to the claimant before any state or federal court or agency in connection with a related matter.

ORDER

Frontier-Kemper Constructor, Incorporated is ORDERED to pay the following:

1) To William E. Dalton, all benefits to which he is entitled under the Act, commencing June 1, 1999;

2) To the Secretary of Labor, reimbursement for any payments that the Secretary has made to Claimant under the Act. The Employer may deduct such amounts, as appropriate, from the amount that it is ordered to pay under paragraph 1 above. 20 C.F.R. §725.602.

3) To Claimant or the Black Lung Disability Trust Fund, as appropriate, interest at the rate established by Section 6621 of the Internal Revenue Code of 1954. Interest is to accrue thirty days from the date of the initial determination of entitlement to benefits. 20 C.F.R. §725.608.

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Rudolf L. Jansen
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington D.C. 20013-7601. A copy of this Notice of Appeal also must be served on Allen Feldman, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.